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In the Supreme Court of the United States

October Term, 1973

NO. 73-365

DENNIS M. O'CONNOR,

Petitioner

vs.

MARY LOUISE O'CONNOR
and
DAVID A. RUSSELL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, THIRD DISTRICT OF FLORIDA

August 28, 1973

DENNIS M. O'CONNOR
Box 8061
Coral Gables, Florida 33124
In Propria Persona

MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, THIRD DISTRICT OF FLORIDA

August 28, 1973

The petitioner, Dennis M. O'Connor, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeals, Third District of Florida entered in this proceeding.

OPINION BELOW

The opinion of the District Court of Appeals, Third District of Florida was reported (274 So.2d 546-47). The Supreme Court of Florida denied certiorari (279 So.2d 34). Copies of these opinions and the appealed order of the trial court, as well as pertinent portions of its record, appear in the Appendix hereto.

JURISDICTION

The judgement of the District Court of Appeals, Third District of Florida was entered on March 13, 1973, and a timely petition for rehearing was denied on April 14, 1973. A timely petition to the Supreme Court of Florida for a writ of certiorari was denied on May 31, 1973. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3) for a right specifically claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether due process requires that a court in taxing attorneys' fees must not exceed the highest value assigned to the attorneys' services by competent evidence of their value.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Section 1: ". . . nor shall any State deprive any person of . . . property without due process of law."

STATEMENT OF THE CASE

Subsequent to a final judgement dissolving marriage, which reserved jurisdiction for award of attorneys' fees, the trial court taxed attorneys' fees against the husband. The parties agreed to rest upon affidavits as evidence of value. Competent evidence set values respectively of $1,850 and $1,900 for the attorneys' services. The wife's attorney also submitted three papers bearing legends: "Affidavit as to Attorney's Fees;" however none of these was sworn to or notarized, and one was neither signed nor notarized. Such papers could not be considered to be evidence, by any stretch of the imagination, even in a proceeding in which the parties agreed to waive cross examination by agreeing to rest upon affidavits of value. The trial court taxed attorneys' fees against the petitioner in the amount of $3,600, an amount which was nearly twice the value set by the highest competent evidence of value, and which was roughly an average of all the papers submitted.

The District Court of Appeals, Third District of Florida, affirmed this award (with amendment to take into account $500 paid by petitioner as temporary fees at an earlier stage of the proceeding) on the stated ground that petitioner "has not sustained the burden of showing an abuse of discretion under the facts of this case." The Supreme Court of Florida denied certiorari.

REASONS FOR GRANTING THE WRIT

This case presents a conflict between the prevailing standards of evidence and judicial discretion. In matters of evidence courts are bound by the proof submitted. As this Court has stated: "Speculation cannot supply the place of proof." *Moore, Adm'x. v. Chesapeake & Ohio R. Co.*, 340

U.S. 573, 578. Even where two inferences could be drawn from the evidence submitted, judgement goes against the party upon whom rests the necessity of sustaining one of the inferences against the other before he is entitled to recover. *Penna. R. Co. v. Chamberlain, Adm'x.*, 288 U.S. 333.

Taxation of attorneys' fees in state courts follows a mixed practice, appellate awards being left to judicial discretion and trial court awards generally being the subject of proof before the court without jury as trier of fact. The decision below, in applying the judicial discretion standard to an award of attorneys' fees by the trial court in nearly twice the amount of the highest value assigned in competent evidence before the trier of fact, raises a substantial due process question. While usually state courts' findings of fact are not reconsidered, this Court will review a state court's findings "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-86. Though this Court's review of the evidence in state court proceedings is usually in criminal matters, the Constitution provides no relative priorities in Amendment XIV for the prohibition of deprivation of life, liberty or property absent due process. The question here is whether the taxation of attorneys' fees in an amount substantially in excess of the highest value assigned by competent evidence is, for that excess, devoid of evidentiary support so as to render it unconstitutional.

When trial courts tax attorneys' fees proof is required, and the idea is usually rejected that reasonableness of the fee is the subject of judicial notice or may be left to conjecture or guesswork. *Lyle v. Lyle* (1964, Fla. App. 2nd) 167 So.2d 256; *Ortiz v. Ortiz* (1968, Fla. App. 3rd) 211 So.2d 243; *Fatolitis v. Fatolitis* (1973, Fla. App. 2nd) 271 So.2d 227, 229. While the Supreme Court of Florida did not state reasons for its denial of certiorari in this case, the "inherency doctrine," as recently modified by that court, limits review of constitutional questions to those decisions in which a provision of the (state) constitution is expressly explained or defined. *Ogle v. Pepin* (1973, Fla. Sup. Ct.) 273 So.2d 391. A decision, such as the decision below, expressly applying solely a "judicial discretion" standard is thus not available for review in Florida by this doctrine of the Supreme Court of Florida.

The problems raised by the decision below are of significant importance to the national community so as to invoke the attention of this Court. Instances are very numerous, undoubtedly many thousands of cases each year, in which courts award attorneys' fees in divorce, workmens' compensation and other matters. If proof of the value of attorneys' services is required and the evidence is controlling, just as it usually is before the trier of fact, then the decision below should be reversed. On the other hand, if judicial notice, guesswork or speculation can be used in setting the fees to be taxed, and if something other than discrepancy with the value set by competent evidence must be shown to show "abuse of discretion," then why should evidence of value be required to be submitted at all? Conflict in the decisions on this point can only be resolved by prompt action of this Court.

Resolution of this matter will necessarily either: a) require conformity in decisions taxing attorneys' fees to the standards of due process applicable to fact finding generally; or b) relieve courts and attorneys of many thousands of hours each year spent on adducing evidence of the value of attorneys' services, if such awards are *sui generis* and beyond ordinary procedural principles. Either result will be of profound significance in a very large number of future cases.

CONCLUSION

Petitioner submits that for these reasons a writ of certiorari should issue to review the judgement and opinion of the District Court of Appeals, Third District of Florida in this matter.

Respectfully submitted,

DENNIS M. O'CONNOR
Box 8061
Coral Gables, Florida 33124
In Propria Persona

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

No. 71-22721 Grossman

MARY LOUISE O'CONNOR,

Petitioner,

-vs-

DENNIS O'CONNOR,

Respondent.

AFFIDAVIT AS TO ATTORNEY'S FEES

STATE OF FLORIDA)
SS:
COUNTY OF DADE)

ON THIS DAY personally appeared before me, the undersigned officer duly authorized to administer oaths and take acknowledgments, IRWIN CHRISTIE, ESQ., who after being by me first duly cautioned and sworn, upon his oath, deposed and said:

That he is a practicing attorney at the bar of the above-entitled Court, and that he is familiar with the amount customarily charged by attorneys and allowed by the Court for attorney's fees for suits in Chancery in said Court and that he knows the reasonable value thereof. That he has reviewed the Court file in the above-entitled cause and has conferred with the attorneys of record for the

plaintiff with regard to services they have performed in addition to those services reflected in the Court file and that in his opinion the sum of $6,200.00 would be a reasonable attorney's fee to be allowed to the plaintiff's attorneys for their services rendered in connection with said cause. In addition he has reviewed the Petition for Attorney's Fees filed by MILLER AND RUSSELL, Esqs., Attorneys for the plaintiff herein, and in his opinion a reasonable fee for filing said Petition and other services in connection with the same would be

_____

IRWIN CHRISTIE

SWORN TO AND SUBSCRIBED

before me on this ____ day of

_____, 1972.

_____

NOTARY PUBLIC, State of
Florida At Large.

My Commission Expires:

_____

[TITLE OMITTED]

AFFIDAVIT AS TO ATTORNEY'S FEES

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

ON THIS DAY personally appeared before me, the undersigned officer duly authorized to administer oaths and take acknowledgments, RICHARD MARX, ESQ., who after being by me first duly cautioned and sworn, upon his oath, deposed and said:

That he is a practicing attorney at the bar of the above-entitled Court, and that he is familiar with the amount customarily charged by attorneys and allowed by the Court for attorney's fees for suits in Chancery in said Court and that he knows the reasonable value thereof. That he has reviewed the Court file in the above-entitled cause and has conferred with the attorneys of record for the plaintiff with regard to services they have performed in addition to those services reflected in the Court file and that in his opinion the sum of $5,900.00 would be a reasonable attorney's fee to be allowed to the plaintiff's attorneys for their services rendered in connection with said cause. In addition he has reviewed the Petition for Attorney's Fees filed by MILLER AND RUSSELL, Esqs., Attorneys for the plaintiff herein, and in his opinion a reasonable fee for filing said Petition and other services in connection with the same would be

/s/ Richard Marx

RICHARD MARX

SWORN TO AND SUBSCRIBED before me on this _____ day of _____, 1972.

_____

NOTARY PUBLIC, State of Florida at Large.

My Commission Expires:

_____

[TITLE OMITTED]

AFFIDAVIT AS TO ATTORNEY'S FEES

STATE OF FLORIDA)
SS:
COUNTY OF DADE)

ON THIS DAY personally appeared before me, the undersigned officer duly authorized to administer oaths and take acknowledgments, SARINO R. COSTANZO, ESQ., who after being by me first duly cautioned and sworn, upon his oath, deposed and said:

That he is a practicing attorney at the bar of the above-entitled Court, and that he is familiar with the amount customarily charged by attorneys and allowed by the Court for attorney's fees for suits in Chancery in said Court and that he knows the reasonable value thereof. That he has reviewed the Court file in the above-entitled cause and has conferred with the attorneys of record for the plaintiff with regard to services they have performed in addition to those services reflected in the Court file and that in his opinion the sum of $6,500.00 would be a reasonable attorney's fee to be allowed to the plaintiff's attorneys for their services rendered in connection with said cause. In addition he has reviewed the Petition for Attorney's Fees filed by MILLER AND RUSSELL, Esqs., Attorneys for the plaintiff herein, and in his opinion a reasonable fee for filing said Petition and other services in connection with the same would be

/s/ Sarino R. Costanzo

SARINO R. COSTANZO

SWORN TO AND SUBSCRIBED before me on this _____ day of _____, 1972.

_____

NOTARY PUBLIC, State of Florida At Large.

My Commission Expires:

_____

[TITLE OMITTED]

AFFIDAVIT AS TO ATTORNEY'S FEES

STATE OF FLORIDA

ss

COUNTY OF DADE

ON THIS DAY personally appeared before me, the undersigned officer duly authorized to administer oaths and take acknowledgements, ARTHUR N. COHEN, ESQ., who after being by me first duly cautioned and sworn, upon his oath, deposed and said:

That he is a practicing attorney at the bar of the above-entitled Court, and that he is familiar with the amount customarily charged by attorneys and allowed by the Court for attorney's fees for suits in Chancery in said Court and that he knows the reasonable value thereof. That he has reviewed the Court file in the above-entitled cause and that he has conferred with attorney of record for the Respondent with regard to services performed by attorney's of record for Petitioner, and that in his opinion the sum of $1,850.00 would be a reasonable fee to be allowed for to the Petitioner's attorneys for their services rendered in connection with the said cause.

/s/ Arthur N. Cohen

ARTHUR N. COHEN

SWORN TO and SUBSCRIBED before me on this 24th day of October, 1972.

/s/ Margaret A. Makarsky

NOTARY PUBLIC, State of Florida At Large

My Commission Expires: Jan. 25, 1973

[TITLE OMITTED]

AFFIDAVIT AS TO ATTORNEY'S FEES

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

BEFORE ME, personally appeared FRANK A. LANE, who being sworn and deposed, says:

1. That he is a practicing attorney and a member of the Bar of the Supreme Court of the United States of America, the Fifth Circuit Court of Appeals, and the Bar of the State of Florida, and that he is familiar with the amount customarily charged by attorneys as attorney's fees in divorce and dissolution of marriage actions.

2. That he has reviewed the file in the above entitled cause and conferred with Respondent and his counsel with regard to the services performed in this cause.

3. That he is of the opinion that the sum of $1,900.00 would be reasonable attorney's fees for the Petitioner's attorney for his services rendered to date in this cause.

/signed/ Frank A. Lane
FRANK A. LANE

SWORN TO AND SUBSCRIBED before me at Miami, Florida, this 24th day of October, 1972.

/s/ Claudina Heineman

Notary Public—State of Florida at Large

My Commission expires: Jan. 26, 1973

[TITLE OMITTED]

ORDER AWARDING COSTS AND ATTORNEY'S FEES

THIS CAUSE came on to be heard this date upon petitioner's motion for attorney's fees and taxation of costs and the Court having reviewed the parties' affidavits submitted for the Court's consideration and being otherwise fully advised in the premises, it is therefore,

ORDERED and ADJUDGED as follows:

1. That costs be and the same are hereby taxed against the respondent in the sum total of $300.56.

2. That husband, DENNIS O'CONNOR, be and he is hereby ordered to pay attorney's fees to wife's attorneys, the lawfirm of Miller and Russell, in the sum total of $3,600.00 for services rendered in behalf of petitioner/wife. That husband shall pay the aforesaid sum at the rate of $600.00 per month until said sum is paid in full.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 3 day of November, A.D., 1972.

/signed/ Rhea Pincus Grossman

CIRCUIT JUDGE

IN THE DISTRICT COURT OF APPEAL,
OF FLORIDA, THIRD DISTRICT

Opinion filed March 13, 1973.

An Interlocutory Appeal from the Circuit Court for Dade County, Rhea P. Grossman, Judge.

Dennis M. O'Connor, in proper person.

Miller & Russell; William Bailey, for appellee.

Before PEARSON, CHARLES CARROLL and HAVERFIELD, JJ.

PER CURIAM.

This interlocutory appeal seeks to reverse, as excessive, an allowance of attorney's fees made to a wife upon dissolution of marriage. We hold that the appellant has not sustained the burden of showing an abuse of discretion under the facts of this case.

An additional point on appeal does require that the trial court order be amended. Appellant points out, without contradiction by the appellee, that the record shows a $500.00 advance payment upon the attorney's fee. This $500.00 payment was not credited against the total amount of the fee in setting the amount to be paid by appellant.

Thereupon, the order appealed is amended, at the end of paragraph number "2", by the addition of the words: "except that the last monthly payment shall be $100.00."

Appellant's remaining points do not present reversible error.

The order appealed is amended and as amended is affirmed.

SUPREME COURT OF FLORIDA

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, Acting Chief Justice, ERVIN, ADKINS, BOYD and McCAIN, JJ., concur

Y

CC: Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
Hon. Rhea P. Grossman, Judge

Hon. Dennis M. O'Connor
Miller and Russell
(Hon. Edgar Miller)

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Kay D. Yent, D.C.